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DORITY & MANNING, P.A.
POST OFFICE BOX 1449
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CRAIG, PAULA L	

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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/730,364
Filing Date: December 8, 2003
Appellants: Morman, Michael T., et al.

James M. Bagarazzi
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed November 10, 2008 appealing from the Office action mailed May 21, 2008.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The following are the related appeals, interferences, and judicial proceedings known to the examiner which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal:

Serial No. 10/730,493.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The statement of the status of Amendments contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,846,232	SERBIAK et al.	12-1998
6,231,557	KRAUTKRAMER et al.	5-2001
2002/0087139	POPP et al.	7-2002

(9) Grounds of Rejection

The following grounds of rejection are applicable to the appealed claims:

Claims 1-4, 6, 8-9, and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 5,846,232 to Serbiak et al.

For Claim 1, Serbiak teaches an absorbent article including a chassis having a front waist region, a back waist region, and a crotch region extending between the front and back waist regions (Abstract, Figs. 1-9, col. 1, lines 6-10, col. 5, lines 62-67, col. 6, lines 1-10, Claim 1). An outer cover member 22 extends longitudinally between the front and back waist regions (Figs. 1-9, col. 6, lines 1-23 and 44-48, Claim 1). A bodyside liner 24 extends longitudinally between the front and back waist regions (Figs. 1-9, col. 6, lines 1-23, Claim 1). Serbiak teaches a non-extensible absorbent body structure 36 sandwiched between the outer cover member 22 and the bodyside liner 24 (Figs. 1-9, col. 2, lines 8-10, col. 7, line 39 to col. 8, line 26, col. 10, lines 12-15, Claims 3, 48). The bodyside liner 24 includes a material having an untensioned and

ungathered, inherently extensible base layer of a fluid permeable material, the base layer extendable to at least about 125% of its original dimension in a first direction essentially without fracture of the base layer material (Figs. 1-9, col. 1, lines 45-60, col. 2, lines 17-34, col. 3, lines 60-66, col. 4, lines 50-60, col. 6, lines 44-67, col. 7, lines 1-10, col. 10, lines 37-48, col. 11, lines 8-63, Claims 1, 4, 23; note that Serbiak indicates that the same materials can be used for the bodyside liner 24 and the outer cover layer 22; note that bodyside liner 24 is described as coexisting with elastic layer 28 in an unstressed and untensioned condition). Serbiak teaches at least a first and a second strip of substantially untensioned elastomeric material wholly disposed on and attached to the base layer material to form flat planar composite regions with a space between the strips such that a center untensioned region of the base layer material is bordered on at least two longitudinally extending sides by the composite regions of the elastomeric materials and the base layer material, with the center region generally disposed over the absorbent body structure (first and second strips include elastic layer 28 in extensible zones 30-30D; center region includes the crosshatched area of absorbent core 36; Figs. 1, 3, and 5-6; col. 2, lines 42-47, col. 6, lines 24-31, col. 7, lines 11-38, col. 8, lines 14-39, col. 9, lines 18-23, col. 9, line 64 to col. 10, line 15; Claims 10, 17, 23, 35; note that Serbiak teaches in col. 2, lines 42-47 and col. 9, lines 18-23 and in Claim 10 that the elastic layer 28 can be disposed where the extensible zones are and does not need to extend over a greater area; the extensible zones are zones 30-30D and are indicated in the figures by circles; Figs. 1, 3, and 5-6 of Serbiak show extensible zones in strips, with nonextensible areas shown by cross-hatching

between the strips). Serbiak teaches the center region of untensioned base layer material being bonded to the immediately underlying portion of the absorbent body structure in registry with the center region of untensioned base layer material in its untensioned condition (base layer material includes bodyside liner layer 24; center region includes the crosshatched area of absorbent core 36; Figs. 1, 3-6, col. 6, lines 10-13, col. 8, lines 8-31, col. 9, lines 24-36, col. 10, lines 12-15, Claims 1, 3, 12, 17, 31; note that Serbiak teaches that the absorbent core 36 is fixed to the base structure 26; the base structure is made up of the outer cover layer 22 and the bodyside liner layer 24). The description in Serbiak that the absorbent core 36 is fixedly attached to the base structure 26, and that the base structure is made up of the outer cover layer 22 and the bodyside liner layer 24, with the result that the base structure is not extensible over the area controlled by the attachment, suggests that the base layer material is directly bonded to the absorbent body structure (base layer material includes bodyside liner layer 24; center region includes the crosshatched area of absorbent core 36; Figs. 1, 3-6 and 8, col. 6, lines 10-13, col. 8, lines 8-31, col. 10, lines 12-15, Claims 1, 3, 12, 17, 31). Serbiak teaches the composite regions being stretchable in at least a second direction of the absorbent article (composite regions include elastic layer 28 in extensible zones 30-30D; Figs. 1, 3, and 5-6; col. 1, lines 39-67, col. 2, lines 17-42, col. 4, lines 50-65, col. 5, lines 45-47, col. 6, lines 1-10, col. 8, lines 26-48, col. 10, line 48 to col. 11, line 26, Claims 1 and 9). Serbiak does not expressly teach the center region of untensioned base layer material being bonded directly to the immediately underlying portion of the absorbent body structure. In light of Serbiak's teaching that the

absorbent body structure is fixedly attached to a structure which includes the base layer material, it would have been obvious to one of ordinary skill in the art to modify Serbiak to include the center region of the base layer material being bonded directly to the immediately underlying portion of the absorbent body structure.

For Claim 25, Serbiak teaches an absorbent article including a chassis having a front waist region, a back waist region, and a crotch region extending between the front and back waist regions (Abstract, Figs. 1-9, col. 1, lines 6-10, col. 5, lines 62-67, col. 6, lines 1-10, Claim 1). An outer cover member 22 extends longitudinally between the front and back waist regions (Figs. 1-9, col. 6, lines 1-23, Claim 1). A bodyside liner 24 extends longitudinally between the front and back waist regions (Figs. 1-9, col. 6, lines 1-23, Claim 1). Serbiak teaches a non-extensible absorbent body structure 36 sandwiched between the outer cover member and the bodyside liner (Figs. 1-9, col. 2, lines 6-11, col. 7, line 39 to col. 8, line 26, col. 10, lines 12-15, Claim 3). The bodyside liner 24 includes a material having an untensioned and ungathered, inherently extensible base layer of a fluid permeable material, the base layer extendable to at least about 125% of its original dimension in a first direction essentially without fracture of the base layer material (Figs. 1-9, col. 1, lines 45-60, col. 2, lines 17-34, col. 3, lines 60-66, col. 4, lines 50-60, col. 6, lines 44-67, col. 7, lines 1-10, col. 10, lines 37-48, col. 11, lines 8-63, Claims 1, 4, 23; note that Serbiak indicates that the same materials can be used for the bodyside liner 24 and the outer cover layer 22; note that bodyside liner 24 is described as coexisting with elastic layer 28 in an unstressed and untensioned condition). Serbiak teaches a strip of substantially untensioned elastomeric material

attached to the base layer material along a longitudinally extending side thereof to form a flat planar composite region, and such that a first region of the base layer material is adjacent a composite region of the elastomeric material and the base layer material, the first region of base layer material that is adjacent the composite region being generally wholly disposed on and bonded to the absorbent body structure (strip includes elastic layer 28; first region includes the crosshatched area of absorbent core 36; Figs. 1, 3-6 and 8; col. 2, lines 42-47, col. 6, lines 24-31, col. 7, lines 11-38, col. 8, lines 17-31, col. 9, lines 18-23; Claims 10, 17, 23, 35; note that Serbiak teaches that the elastic layer 28 can be disposed where the extensible zones 30-30D are and does not need to extend over a greater area; the extensible zones are indicated in the figures by circles). Serbiak teaches the first region of base layer material being bonded to the immediately underlying portion of the absorbent body structure in registry with the first region of base layer material in its untensioned condition (base layer material includes bodyside liner layer 24; first region includes the crosshatched area of absorbent core 36; Figs. 1, 3-6 and 8, col. 6, lines 10-13, col. 8, lines 8-26, col. 9, lines 24-36, col. 10, lines 12-15, Claims 1, 3, 12, 17, 31; note that Serbiak teaches that the absorbent core 36 is fixed to the base structure 26; the base structure is made up of the outer cover layer 22 and the bodyside liner layer 24). The description in Serbiak that the absorbent core 36 is fixedly attached to the base structure 26, and that the base structure is made up of the outer cover layer 22 and the bodyside liner layer 24, with the result that the base structure is not extensible over the area controlled by the attachment, suggests that the base layer material is directly bonded to the absorbent body structure (base layer material includes

bodyside liner layer 24; first region includes the crosshatched area of absorbent core 36; Figs. 1, 3-6 and 8, col. 6, lines 10-13, col. 8, lines 8-26, col. 10, lines 12-15, Claims 1, 3, 12, 17, 31). Serbiak teaches the composite region being stretchable in at least a transverse direction of the absorbent article (composite regions include elastic layer 28 in extensible zones 30-30D; Figs. 1, 3-6, and 8; col. 1, lines 39-67, col. 2, lines 17-42, col. 4, lines 50-65, col. 5, lines 45-47, col. 6, lines 1-10, col. 8, lines 26-48, col. 10, line 48 to col. 11, line 26, Claims 1 and 9). Serbiak does not expressly teach the first region of base layer material being bonded directly to the immediately underlying portion of the absorbent body structure. In light of Serbiak's teaching that the absorbent body structure is fixedly attached to a structure which includes the base layer material, it would have been obvious to one of ordinary skill in the art to modify Serbiak to include the first region of the base layer material being bonded directly to the immediately underlying portion of the absorbent body structure.

For Claim 2, Serbiak teaches the article being a training pant, diaper, or incontinence article (col. 5, lines 62-67).

For Claim 3, Serbiak teaches the base layer material defining a pair of opposed lateral side edges, each of the first and second elastomeric strips defining a lateral side edge that is aligned with one of the lateral edges of the base layer material (base layer material includes bodyside liner layer 24; elastomeric strips include elastic layer 28 in extensible zones 30-30D; Figs. 1, 3-6, and 8; col. 6, lines 24-31).

For Claim 4, Serbiak teaches the base layer material 24 including a non-woven material (col. 6, lines 44-67, col. 7, lines 1-10; note the same materials can be used for

the outer cover layer 22 and the bodyside liner layer 24; note that spunbonded and meltblown webs are types of nonwoven webs).

For Claim 6, Serbiak teaches the first and second elastomeric materials including an elastic film, the films being laminated to the base layer material (elastomeric strips include elastic layer 28 in extensible zones 30-30D; Figs. 1, 3-6, and 8; Abstract, col. 7, lines 11-39).

For Claim 8, Serbiak teaches that the elastomeric materials are attached to the base layer material in a generally untensioned state (col. 1, lines 55-60, col. 3, lines 53-66, col. 7, lines 22-38, col. 10, lines 38-58, Claim 1).

For Claim 9, Serbiak teaches elastomeric materials which are fully capable of being attached to the base layer material in a generally tensioned state (elastic layer 28 can be placed in a state of tension while attached to the base layer material by extending the material; Figs. 1-9, col. 7, lines 11-36).

Claims 5 and 7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Serbiak in view of Krautkramer (US 6,231,557).

For Claim 5, Serbiak teaches all the limitations of Claim 4, as described above. Serbiak teaches the base layer material 24 including a nonwoven material which includes a spunbond material (col. 6, lines 44-67, col. 7, lines 1-10; note the same materials can be used for the outer cover layer 22 and the bodyside liner layer 24). Serbiak does not teach the spunbond material being a bicomponent spunbond material. However, bicomponent spunbond materials are well known in the art. Krautkramer

confirms this and teaches a bodyside liner which is a bicomponent spunbond material (col. 41, line 62 to col. 44, line 29). In light of Serbiak's teaching of a spunbond material, it would have been obvious to one of ordinary skill in the art to modify Serbiak to include the spunbond material being a bicomponent spunbond material, as taught by Krautkramer.

For Claim 7, Serbiak teaches the first and second elastomeric materials including elastomeric fibers (strands of elastic material, Abstract, col. 7, lines 11-21). Serbiak does not expressly teach the strands of elastic material forming webs. However, webs of elastic material are well known in the art. Krautkramer confirms this and teaches elastomeric materials including webs of elastomeric fibers (col. 23, lines 24-55). In light of Serbiak's teaching of strands of elastic material, it would have been obvious to one of ordinary skill in the art to modify Serbiak to include webs of elastomeric fibers, as taught by Krautkramer.

Claims 13-14 and 16-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Serbiak in view of Popp (US 2002/0087139).

For Claim 13, Serbiak teaches all the limitations of Claim 1, as described above. Serbiak teaches the composite regions of the bodyside liner defining composite strips extending laterally from the center region (composite strips include the elastic layer 28 of extensible zones 30-30D, Figs. 1, 3-6, and 8; col. 2, lines 42-47, col. 6, lines 24-31, col. 7, lines 11-38, Claims 1 and 10). Serbiak does not teach each of the strips being folded to form a folded composite region at a side fold line of the chassis. Applicant's

specification does not disclose that this folded configuration serves any stated purpose or solves any particular problem. In addition, this feature is well known in the art. Popp confirms this and teaches elasticized composite strips of the bodyside liner being folded at a side fold line of the chassis, extending laterally from the fold line toward the center region with a portion above and below the absorbent body structure, and being attached to each other such that the composite regions also define an outer cover member of the chassis (Abstract, Figs. 1-4, paragraphs 50-51, 63, 69-70). Popp teaches that this configuration creates a bucket for containing body fluids, with a soft and comfortable leg and side seal (paragraphs 7-8). It would have been obvious to one of ordinary skill in the art at the time of the invention by the Applicant to modify Serbiak to include each of the composite regions being folded to form a folded composite region at a respective opposite side fold line of the chassis, extending laterally from the fold line toward the center region with a portion above and below the absorbent body structure, and being attached to each other such that the folded composite regions also define the outer cover member of the chassis, as taught by Popp, to create a bucket for containing body fluids, with a soft and comfortable leg and side seal, as taught by Popp.

For Claim 14, Serbiak teaches leg elastics 40 (Figs. 1-9, col. 8, lines 30-48, Claim 38). Serbiak does not teach leg elastics between folded composite regions of the bodyside liner. Applicant's specification does not disclose that leg elastics between folded composite regions of the bodyside liner serve any stated purpose or solve any particular problem. Popp teaches leg elastics between folded portions of the bodyside liner (Abstract, Figs. 1-4, paragraphs 48-51, 63, 69-70). Popp teaches that this

configuration creates a bucket for containing body fluids, with a soft and comfortable leg and side seal (paragraphs 7-8). It would have been obvious to one of ordinary skill in the art at the time of the invention by the Applicant to modify Serbiak to include leg elastics between folded portions of the bodyside liner, as taught by Popp, to create a bucket for containing body fluids, with a soft and comfortable leg and side seal, as taught by Popp.

For Claim 16, Serbiak does not teach portions of the composite regions of the bodyside liner being folded outboard of the absorbent body structure so as to define containment flaps. Applicant's specification does not disclose that using folded composite regions of the bodyside liner as the containment flaps serves any stated purpose or solves any particular problem. In addition, the bodyside liner being folded outboard of the absorbent body structure to define containment flaps is well known in the art. Popp confirms this and teaches portions of the bodyside liner being folded outboard of the absorbent body structure so as to define containment flaps (Abstract, Figs. 1-4, paragraphs 48-51, 63, 69-70). Popp teaches that this configuration creates a bucket for containing body fluids, with a soft and comfortable leg and side seal (paragraphs 7-8). It would have been obvious to one of ordinary skill in the art at the time of the invention by the Applicant to modify Serbiak to include the bodyside liner being folded outboard of the absorbent body structure to define containment flaps, as taught by Popp, to create a bucket for containing body fluids, with a soft and comfortable leg and side seal, as taught by Popp.

For Claim 17, Serbiak teaches the composite regions being attached to the absorbent body structure (Figs. 1, 3-6, and 8; col. 8, lines 17-26, col. 9, lines 24-36, col. 10, lines 6-15, Claims 3, 12, 31; note that the claim does not require direct attachment).

For Claim 18, Serbiak teaches the composite regions of the bodyside liner defining longitudinal composite strips extending outwardly from the center region and defining elastomeric side panels that are attached at side seams of the chassis to define a pant-like structure (Figs. 1, 3-6, and 8, col. 6, lines 32-43, col. 12, lines 30-39, Claim 32; attachment elements 32 attach the side seams). Serbiak does not teach the longitudinal composite strips being folded outboard of the side panels at fold lines and extending laterally back under the absorbent body structure and attached to each other such that the composite regions also define the outer cover member of the chassis. Applicant's specification does not disclose that folding strips of the bodyside liner, extending them laterally back under the absorbent body structure, and attaching them to each other as the outer cover member serves any stated purpose or solves any particular problem. In addition, the bodyside liner being folded outboard of the side panels at fold lines and extending laterally back under the absorbent body structure, attached to each other such that the bodyside liner also defines at least part of the outer cover member of the chassis, is well known in the art. Popp confirms this and teaches the bodyside liner being folded outboard of the side panels at fold lines and extending laterally back under the absorbent body structure, attached to each other such that the bodyside liner also defines at least part of the outer cover member of the chassis (Abstract, Figs. 1-4, paragraphs 48-51, 63, 69-70). Popp teaches that this configuration

creates a bucket for containing body fluids, with a soft and comfortable leg and side seal (paragraphs 7-8). It would have been obvious to one of ordinary skill in the art at the time of the invention by the Applicant to modify Serbiak to include the bodyside liner being folded outboard of the side panels at fold lines and extending laterally back under the absorbent body structure, attached to each other such that the bodyside liner also defines at least part of the outer cover member of the chassis, as taught by Popp, to create a bucket for containing body fluids, with a soft and comfortable leg and side seal, as taught by Popp.

For Claim 19, Serbiak teaches the article being a child's training pant (col. 5, lines 62-67).

(10) Response to Argument

Applicant argues that the absorbent core 36 of Serbiak is not itself non-extensible. However, Serbiak expressly teaches that the absorbent core is non-extensible (col. 2, lines 7-10, Claims 3 and 48). While not necessary to this argument, note that Serbiak teaches that suitable materials for the absorbent core include cellulosic fluff, wood pulp fluff, and superabsorbent material (col. 7, line 39 to col. 8, line 3). Applicant's specification teaches that cellulosic fibers, cellulosic fluff, wood pulp fibers, wood pulp fluff, and superabsorbent material are suitable for the absorbent body structure (specification, page 27, lines 1-34, or paragraph 103 in the published specification; note that "cellulosic fluff" and "cellulosic fibers" are generally equivalent terms, and "wood pulp fluff" and "wood pulp fibers" are generally equivalent terms). The

same materials disclosed by Serbiak are stated by Applicant to be suitable for the absorbent body structure. Therefore, absent evidence to the contrary, the absorbent body structure taught by Serbiak is presumed to be suitable for the invention. See *In re Fitzgerald*, 619 F.2d 67, 70, 205 USPQ 594, 596 (CCPA 1980).

Applicant argues that it is the combination of absorbent core 36 and base structure 26 which forms a non-extensible area, rather than the absorbent core 36 itself being non-extensible. Applicant argues that Serbiak teaches that but for the attachment to the base structure 26, the absorbent core 36 can be part of an elastic extensible zone 30. The fact that Serbiak teaches that in the extensible zones the absorbent core 36 is not secured to the base structure 26 indicates that it is not the absorbent core 36 which is extensible; rather, it appears the lack of attachment in the extensible zones allows extensibility without affecting the absorbent core (col. 8, lines 8-48, col. 9, line 24 to col. 10, line 58, Claims 12, 18, 23, 31, 48; note that while the absorbent article 8 is described as being extensible in the extensible zones, this does not necessarily imply that the absorbent core 36 itself must be extensible; the base structure 26 is described as having extensibility of its own).

Applicant argues that a product by process argument is inapplicable as Claims 1 and 25 cannot be interpreted to require a product by process limitation. This is true. However, it is also true that the method by which the absorbent body structure is made non-extensible is irrelevant in an apparatus claim. Arguments made by the Applicant that Serbiak teaches that the absorbent core 36 is made non-extensible by its

attachment to base structure 26 and is therefore not actually non-extensible are therefore also irrelevant.

Applicant argues that it is implausible that two extensible elements should become non-extensible when attached to one another. However, Serbiak does not indicate that the absorbent core 36 itself is extensible or must be extensible.

Applicant argues that the direct bonding of the center region of the base layer material to the immediately underlying portion of the absorbent body structure allows the outlying composite regions to absorb any stretching that otherwise might reach the absorbent body structure and ruin the optimal capillary structure. However, while Serbiak does not mention protecting the capillary structure of the absorbent core 36 in the nonextensible areas, the structure described by Serbiak appears to function in the same way (col. 4, lines 38-42, col. 6, lines 10-43, col. 7, line 1 to col. 10, line 58, Claim 3).

Applicant argues that direct bonding is completely different from indirect attachment, and that Serbiak discloses at best only indirect attachment to the bodyside liner. Serbiak teaches that the absorbent core 36 is secured to the base structure 26 in the nonextensible areas, that the base structure 26 is composed of the bodyside liner 24 and the outer cover 22, and that the absorbent core 36 is adjacent to the bodyside liner 24 (col. 2, lines 8-14, col. 3, lines 52-54, col. 6, lines 10-14 and 41-43, col. 8, lines 8-20, col. 9, lines 33-36, Claims 3, 12, 31, 44, 48). Certainly Serbiak does not teach away from direct attachment between the bodyside liner 24 and the absorbent core 36 in the nonextensible areas. While not necessary to this argument, note that Applicant's

specification suggests that direct bonding and indirect bonding are equivalent in some contexts (specification, page 8, lines 23-28, paragraph 37 as published). Popp also suggests that direct and indirect bonding are equivalent (Popp, paragraph 24).

For Claim 9, Applicant argues that Serbiak does not teach the elastomeric materials being attached to the base layer material in a generally tensioned state, but rather teaches that the bodyside liner, outer cover, and elastic layer can simultaneously coexist in an unstressed condition and that no significant stress is placed upon the layers at the time the extensible zone is formed. The elastomeric materials described by Serbiak can exist in either a generally untensioned state or in a generally tensioned state, depending upon the conditions of use of the article (col. 7, lines 11-38). Claim 9, as an apparatus claim, requires no more than this. Claim 9 should not be interpreted as necessarily requiring attaching the elastomeric materials to the base layer material while the elastomeric materials are in a generally tensioned state, as this would be a method step. Arguments by Applicant as to the method steps involved in attaching a tensioned elastic and then allowing it to retract are therefore irrelevant. Note that the word "generally" in "generally tensioned" is not defined. Also note that Claim 1, on which Claim 9 is dependent, requires that the first and second strips of elastomeric material are substantially untensioned.

For Claim 7, Applicant argues that Krautkramer does not mention the word "web", and so does not teach a web of elastomeric fibers. However, Krautkramer teaches elastic members including several non-parallel strands of elastic material, in which the strands may intersect or otherwise interconnect within the elastic member

(col. 23, lines 24-55). Several non-parallel strands of material in which the strands intersect or otherwise interconnect is considered by the Examiner to be a good definition of the word "web". "Web" as such is not defined in Applicant's specification.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Paula Craig

/Paula L Craig/

Examiner, Art Unit 3761

Conferees:

Tatyana Zalukaeva

/Tatyana Zalukaeva/

Supervisory Patent Examiner, Art Unit 3761

/Leslie R. Deak/

Primary Examiner, Art Unit 3761